ORIGINAL

No. 85-5189

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

LAMONT JULIUS McLAUGHLIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that he was not using a "dangerous weapon" during a bank robbery because the gun he used to rob the bank was not loaded.

1. It is uncontested (see Pet. 6) that on July 29, 1984, petitioner and Ronald Tyrone Hill entered the Equitable Bank in Baltimore, Maryland, wearing stocking masks and gloves. Petitioner pointed a handgun at two tellers and at other individuals in the bank and ordered them to put up their hands. Hill then vaulted the counter, directed the two tellers to open their money drawers, and removed the money from the drawers. As the two men fled the bank, they were apprehended by a police officer, who recovered from them a brown paper bag containing $3,400 in currency. The handgun displayed by petitioner during the robbery was subsequently determined not to have been loaded.

Petitioner pleaded guilty to bank robbery, in violation of 18 U.S.C. 2113(a), and bank larceny, in violation of 18 U.S.C. 2113(b). After a bench trial on stipulated facts in the United States District Court for the District of Maryland, petitioner was convicted of using a dangerous weapon during the commission of a bank robbery, in violation of 18 U.S.C. 2113(d). He received concurrent sentences of twenty years for bank robbery,

eight years for bank larceny, and twenty-five years for bank robbery by use of a dangerous weapon. The court of appeals affirmed without opinion (Pet. App. A1).

2. Section 2113(d) provides for punishment of up to twenty-five years' imprisonment for any person who, while committing bank robbery or bank larceny, "assaults any person, or puts in jeopardy the life of any person by use of a dangerous weapon or device." 1/ Petitioner's contention that he did not violate Section 2113(d) because his gun was not loaded is wrong. Although it was not loaded, petitioner's gun was nevertheless a "dangerous weapon." By pointing it at the tellers and other persons, he both assaulted them and put their lives in jeopardy because an unloaded gun inspires apprehension, which may cause violence. As the Fourth Circuit explained in United States v. Bennett, 675 F.2d 596, 599, cert. denied, 456 U.S. 1011 (1982):

> Brandishing weapons during a robbery threatens victims and bystanders alike. The same danger, apprehension, and tension are created whether the gun is loaded or unloaded. A robber might well strike a recalcitrant teller with an unloaded rifle; a guard or a passing policeman, seeing a rifle displayed, might well reflexively fire his weapon, endangering robbers and bystanders alike; a threatening weapon might trigger precipitous action on the part of frightened or nervous bank employees or bystanders. A weapon openly exhibited by a robber during a robbery is a dangerous weapon whether loaded or unloaded, and such exhibition violates section 2113(d). 2/

Petitioner argues (Pet. 7-8, 12) that allowing an unloaded gun to qualify as a "dangerous weapon" eliminates the distinction between Section 2113(d) and Section 2113(a), which makes it a

1/ The phrase "by use of a dangerous weapon" modifies both "assaults" and "puts in jeopardy the life of any person." Simpson v. United States, 435 U.S. 6, 11-12 n.6 (1978).

2/ A number of courts have held that fake bombs, like unloaded guns, are "dangerous weapons" within the meaning of Section 2113(d). See United States v. Shannahan, 605 F.2d 539, 541-542 (10th Cir. 1979); United States v. Cooper, 462 F.2d 1343, 1344-1345 (5th Cir.), cert. denied, 409 U.S. 1009 (1972); United States v. Beasley, 438 F.2d 1279, 1282-1283 (6th Cir.), cert. denied, 404 U.S. 866 (1971); but see Bradley v. United States, 447 F.2d 264 (8th Cir. 1971).

crime to take property from a bank "by force and violence." There is no merit to this argument. A person can take property from a bank "by force and violence" without using a weapon of any sort. Section 2113(d) provides for additional punishment if, in addition to force, a weapon is used. 3/

3. Petitioner contends (Pet. 7) that the Second, Eighth, and Ninth Circuits have held that an unloaded handgun is not a dangerous weapon under Section 2113(d). While there is some confusion, there is no clear conflict among the circuits. Only one district court has taken a position squarely in conflict with the Fourth Circuit. Since robbers apparently do not frequently use unloaded guns to rob banks, review by this Court is not warranted in the absence of a clear conflict in the circuits.

There is no conflict with the Second Circuit. In United States v. McAvoy, 574 F.2d 718 (2d Cir. 1978), the defendant claimed that the district court had erred in failing to instruct the jury that, in order to convict him under Section 2113(d), it must find that the guns displayed during the bank robbery were "operable." The court of appeals rejected the claim on the ground that, in the absence of any proof that the guns were unloaded, the district court had properly instructed the jury that it could infer that the guns were loaded from the fact that they were displayed during the robbery. Id. at 720-721. See also United States v. Archibald, 734 F.2d 938, 943-944 (2d Cir. 1984). Thus, the court never squarely decided whether an unloaded gun is a "dangerous weapon."

3/ Under 18 U.S.C. 111 -- which makes it a crime to "forcibly assault" an officer of the United States while in the performance of his official duties and which increases the penalty where the assault is committed by use of a "deadly or dangerous weapon" -- such items as a walking stick (United States v. Logan, 551 F.2d 164 (7th Cir.), cert. denied, 433 U.S. 912 (1977)), a telephone (United States v. Farries, 459 F.2d 1057 (3rd Cir. 1972), cert. denied, 410 U.S. 912 (1973)), and a shoe (United States v. Barber, 297 F. Supp. 917 (D. Del. 1969)), have been held to qualify as a "dangerous weapon."

Nor has the Eighth Circuit held that an unloaded gun is not a dangerous weapon under Section 2113(d). In United States v. Cobb, 558 F.2d 486 (8th Cir. 1977), the court of appeals vacated the defendant's conviction under Section 2113(d), since the only evidence that the defendant had used a gun was the testimony of one witness who said she saw "two dark holes * * * protruding from the newspaper held by the robber" (id. at 488). The court concluded that this evidence "was insufficient to establish that a gun was in fact used in the robbery" (id. at 489). Although the court went on to say that a gun used during a bank robbery must be loaded to be a dangerous weapon under Section 2113(d) (ibid.), that language is dicta.

Nor is there a conflict with the Ninth Circuit. As the district court stated in United States v. Potts, 548 F. Supp. 1239, 1240 (N.D. Cal. 1982), "the issue this case presents has not been directly addressed by the Court of Appeals for the Ninth Circuit." 4/ The district court went on to conclude that an unloaded gun is not a dangerous weapon under Section 2113(d). Like petitioner, the district court thought that a contrary holding would "destroy any distinction between § 2113(a) and 2113(d)" (id. at 1240). As we have explained, this argument is unpersuasive. The distinction between Section 2113(a) and Section 2113(d) is that Section 2113(d) provides for additional

4/ In United States v. Booth, 660 F.2d 1231 (9th Cir. 1981), the court of appeals was faced with the issue of whether the district court improperly excluded from evidence a list of gun stores and ammunition that the government sought to introduce as proof that the defendant used guns and therefore "put people's lives in danger during the commission of the bank robbery" (id. at 1239). In Booth the government conceded that it had to prove that at least one of the guns was loaded (id. at 1239), so the issue of whether an unloaded gun is a dangerous weapon was not contested. In United States v. Jones, 512 F.2d 347 (9th Cir. 1975), the defendant argued that he could not be convicted under Section 2113(d) because no direct evidence was introduced that the gun in his possession during the robbery was loaded. In rejecting the claim, the court of appeals found sufficient evidence from which the jury could infer that the gun was loaded. Id. at 351-352.

punishment if a "dangerous weapon" is used, whereas Section 2113(a) does not require the use of any weapon at all. 5/

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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5/ Responding to arguments advanced in Bennett, supra, United States v. Brannon, 616 F.2d 413, 419-420 (9th Cir.) (Sneed, J., concurring) (unloaded gun), cert. denied, 447 U.S. 908 (1980), and United States v. Beasley, supra (6th Cir.) (fake bomb), the district court also concluded that "the argument that an unloaded gun is a dangerous weapon because it can be used for pistol whipping proves too much. Any heavy metal object, wooden club, or human fist could be used to strike someone" (548 F. Supp. at 1240-1241). But metal objects and wooden clubs, like guns, are dangerous weapons, as courts construing 18 U.S.C. 111 have held (see note 3, supra). The district court also argued that "the suggestion that an unloaded gun during a robbery may trigger violent retaliation" was unpersuasive since "[a] bank robber who thrusts his fist forward inside his coat pocket and asserts that it is a gun may create a danger of retaliation" (548 F. Supp. at 1241). But it would surely have been reasonable for Congress, in enacting Section 2113(d), to conclude that a fist thrust forward inside a coat pocket does not create a danger of retaliation equivalent to the brandishing of a gun.